SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 301

THE BOARD OF EDUCATION OF THE CITY OF [illegible], et al.,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

SUPPLEMENTAL BRIEF OF APPELLANTS

[illegible]

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[illegible]

INDEX.

Page

Explanatory statement 1

Appendix 1—Opinion in case of Monroe v. Board of Commissioners, City of Jackson, Tenn. 7

Cases Cited.

Briggs v. Elliott, 132 F. Supp. 776 (E. D. S. C. 1955).. 2

Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), petition for certiorari filed, O. T. 1967, No. 131 2

Goss v. Board of Education of City of Knoxville, 373 U. S. 683 2

Monroe v. Board of Commissioners, City of Jackson, Tenn., Nos. 17118 and 17119 (6th Cir., decided July 21, 1967) 1, 2

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No. 301.

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS.

The purpose of this supplemental brief is to invite to the Court's attention a recent decision of the Sixth Circuit Court of Appeals which was decided after the filing of our petition for certiorari. In that case, **Monroe v. Board of Commissioners, City of Jackson, Tenn.**, Nos. 17118 and 17119 (6th Cir., decided July 21, 1967), the Sixth Circuit criticizes and refuses to follow the decision below of the Fifth Circuit with regard to its newly adopted constitutional standards governing student assignments—which is the principal issue as to which review is sought by our

petition. The **Monroe** opinion is printed as Appendix 1, *infra*. This decision now brings the Sixth Circuit, as well as the Fourth and Eighth Circuits, clearly into conflict with the decision below.

In **Monroe** the Sixth Circuit specifically rejects the view of the Fifth Circuit in **Jefferson County** that the Fourteenth Amendment and this Court's decisions in **Brown v. Board of Education** and its progeny affirmatively require compulsory integration, that the constitutional sufficiency of a desegregation plan depends upon its mathematical results, and that different constitutional duties and principles apply to Southern schools previously having so-called "de jure segregation" than to Northern schools having so-called "de facto segregation." In doing so, the Sixth Circuit reaffirmed the principles previously formulated by it in **Deal v. Cincinnati Board of Education**, 369 F. 2d 55 (6th Cir. 1966), petition for certiorari filed, O. T. 1967, No. 131, and applied them to two school systems in Tennessee which, until the commencement of desegregation suits in 1963, had operated "de jure-segregated" schools. Ironically, the Tennessee school systems involved are located little more than fifty miles from schools in Alabama and Mississippi which are governed by the contrary decision of the Fifth Circuit.

The conflict between **Monroe** and the decision below is indicated in the following excerpts from the Sixth Circuit's opinion. After noting and approving the district court's conclusion that "the Fourteenth Amendment [does] not command compulsory integration of all of the schools",[1] the Sixth Circuit holds that its interpretation of **Brown** in **Deal v. Cincinnati Board of Education**, *supra*, as

[1] The district court's conclusion was based on this Court's opinion in **Goss v. Board of Education of City of Knoxville**, 373 U. S. 683, on **Briggs v. Elliott**, 132 F. Supp 776 (E. D. S. C. 1955), and on previous decisions of the Fifth Circuit which the decision below now overrules. See 244 F. Supp. at 356-58.

"prohibiting only enforced segregation" is applicable equally to a school system which had "de jure-segregated" schools:

> We are at once aware that we were there [in **Deal**] dealing with the Cincinnati schools which had been desegregated long before **Brown**, whereas we consider here Tennessee schools desegregated only after and in obedience to **Brown**. We are not persuaded, however, that we should devise a mathematical rule that will impose a different and more stringent duty upon states which, prior to **Brown**, maintained a de jure biracial school system, than upon those in which the racial imbalance in its schools has come about from so-called de facto segregation—this to be true even though the current problem be the same in each state.

It then considers and rejects the contrary view of the Fifth Circuit in the decision below:

> We are asked to follow **United States v. Jefferson County Board of Education**, 372 F. (2) 836 (C. A. 5, 1966), which seems to hold that the pre-Brown biracial states must obey a different rule than those which desegregated earlier or never did segregate. This decision decrees a dramatic writ calling for mandatory and immediate integration. In so doing, it distinguished **Bell v. School City of Gary, Indiana**, 324 F. (2) 209 (C. A. 7, 1963), cert. den. 377 U. S. 924, on the ground that no pre-Brown de jure segregation had existed in the **City of Gary, Indiana**, 372 F. (2) at 873. It would probably find like distinction in our **Tina Deal** decision because of Cincinnati's long ago desegregation of its schools. We, however, have applied the rule of **Tina Deal** to the schools of Tennessee. * * * However ugly and evil the biracial school systems appear in contemporary thinking, they were, as **Jefferson**, *supra*, concedes, de jure and were once

> found lawful in **Plessy v. Ferguson,** 163 U. S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by **Brown** would be in the nature of imposing a judicial Bill of Attainder. Such proscriptions are forbidden to the legislatures of the states and the nation—U. S. Const., Art. I, Section 9, Clause 3 and Section 10, Clause 1. Neither, in our view, would such decrees comport with our current views of equal treatment before the law.

The opinion concludes that:

> [T]o the extent that **United States v. Jefferson County Board of Education,** and the decisions reviewed therein, are factually analogous and express a rule of law contrary to our view herein and in **Deal,** we respectfully decline to follow them.

The Fourth, Sixth, and Eighth Circuits, together with the Fifth, embrace most of the Southern and Border states, which of course are those principally concerned with the desegregation of school systems operating segregated schools countenanced by state law when **Brown** was decided in 1954. As the Fifth Circuit's majority opinions below acknowledge, there certainly is no basis for application of different constitutional standards and theories of constitutional interpretation to previously "de jure-segregated" schools in the Fifth Circuit than to such schools in the Fourth, Sixth, and Eighth Circuits. Whether the decision below of the Fifth Circuit or the decisions of the Fourth, Sixth, and Eighth Circuits are ultimately determined to be the correct interpretation of the constitutional requirements of **Brown v. Board of Education,** the anomaly of such disparate results should not be permitted to stand. Petitioners therefore respectfully reiterate their suggestion to the Court that the questions raised by their petition and the decision below are of such

far-reaching importance to the implementation of this Court's school desegregation decisions and to uniformity in the framing of constitutional standards by the circuits that their resolution by this Court through a grant of the writ of certiorari is fully warranted.

Respectfully submitted,

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